

**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS
BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT
DEPARTMENT; and CEL-A-PAK, INC., a
California corporation,
Respondents.

**RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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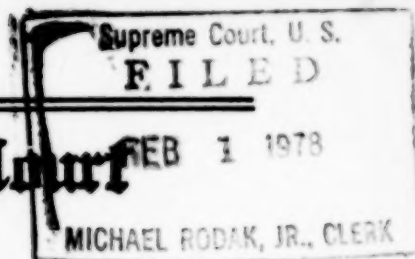
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Subject Index

	Page
Preliminary statement	1
Jurisdiction	2
Question presented	2
Constitutional and statutory provisions involved	3
Statement of the case and proceedings below	4
Reasons for granting the writ	4

I

The California Employment Development Department has no compelling interest which would justify the denial of unemployment insurance benefits to a claimant who quit her job because of an actual conflict between her working conditions and her bona fide religious beliefs	4
---	---

A

The interests of respondent department would not be adversely affected by the granting of benefits to petitioner	5
--	---

B

Respondent department's interest does not justify a rule permitting the waiver of First Amendment rights	6
--	---

II

The California Supreme Court erred in holding that, under Sherbert, the right to religious freedom constitutes "good cause" for a refusal of suitable work, but that same right does not constitute "good cause" for the voluntary quit in this case	8
--	---

Conclusion	12
------------------	----

Table of Authorities Cited

Cases	Pages
King v. California Unemployment Insurance Appeals Bd. (1972) 25 Cal.App.3d 199	10, 11
McCrae v. Calif. Unemployment Ins. App. Bd. (1973) 30 Cal.App.3d 89	10
Morrison v. Cal. Unemployment Ins. Appeals Bd. (1976) 65 Cal.App.3d 245	11
Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App.3d 29	11
Sherbert v. Verner (1963) 374 U.S. 398	2, 8, 10, 12
Syrek v. Calif. Unemployment Ins. App. Bd. (1960) 54 Cal.2d 519	9, 10
Thornton v. Dept. of Human Resources Dev. (1973) 32 Cal. App.3d 180	10
Warriner v. Unemployment Ins. Appeals Bd. (1973) 32 Cal.App.3d 353	11

Codes

California Unemployment Insurance Code:	
Section 1256	5, 9
Section 1257	3
Section 1257(b)	9
Section 1522	3, 5

Constitutions

United States Constitution, First Amendment	2, 3, 6, 10, 12
---	-----------------

Rules

United States Supreme Court Rule 19	2
---	---

Statutes

28 U.S.C., Section 1257(3)	2
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PRELIMINARY STATEMENT

Respondent California Employment Development
Department¹ fully supports the petition herein. Re-

¹Respondent California Employment Development Department
is hereinafter referred to as "Respondent Department."

spondent Department did not appear in this litigation beyond the California Superior Court level, because it was convinced that the Superior Court was correct in holding that *Sherbert v. Verner* (1963) 374 U.S. 398 controlled this case. Respondent Department is equally convinced that the California Supreme Court erred when it refused to apply *Sherbert* to this case and instead grafted a concept of "waiver" to the First Amendment right to freely exercise religious beliefs. As the state agency charged with the administration of the Unemployment Insurance system in California, Respondent Department is required in all similar unemployment insurance eligibility decisions to apply this "waiver" concept as expressed by the California Supreme Court. For these reasons, Respondent Department feels that it is imperative that the Petition for Writ of Certiorari be granted.

JURISDICTION

The California Supreme Court has decided a federal question of substance in a manner inconsistent with applicable decisions of this Court. Respondent Department therefore invokes this Court's jurisdiction under 28 U.S.C. 1257(3) and U.S. Supreme Court Rule 19.

QUESTION PRESENTED

Whether, in light of this Court's holding in *Sherbert v. Verner*, the denial of unemployment insurance

benefits to a Sabbatarian whose loss of employment was solely due to her refusal to work on her Sabbath, unconstitutionally burdens her First Amendment rights to the free exercise of religion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

To avoid repetition, Respondent Department respectfully refers the Court to the constitutional and statutory provisions cited in the Petition, pages 3 and 4. To these Respondent Department would add the following:

Section 1257 of the California Unemployment Insurance Code provides in part as follows:

"An individual is also disqualified for unemployment compensation benefits if:

* * *

"(b) He, without good cause, refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by a public employment office."

Section 1522 of the California Unemployment Insurance Code provides as follows:

"The Unemployment Fund shall be administered by the director exclusively for the purposes of this division without liability upon the part of the state beyond the amounts paid into and earned by the fund."

**STATEMENT OF THE CASE AND
PROCEEDINGS BELOW**

Again, to avoid repetition, Respondent Department respectfully refers the Court to petitioner's statement of the case, and description of the proceedings below.

REASONS FOR GRANTING THE WRIT

Respondent submits that the California Supreme Court has by its decision below, seriously undercut the right of workers in California to exercise their religious freedoms. The Court's decision is not in accord with the applicable decisions of this Court, and if allowed to stand, will require Respondent Department to disqualify from receipt of unemployment insurance benefits California workers who feel bound to follow sincerely held religious convictions.

I

THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT HAS NO COMPELLING INTEREST WHICH WOULD JUSTIFY THE DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS TO A CLAIMANT WHO QUIT HER JOB BECAUSE OF AN ACTUAL CONFLICT BETWEEN HER WORKING CONDITIONS AND HER BONA FIDE RELIGIOUS BELIEFS.

Respondent Department has an interest, a substantial interest, in protecting the Unemployment Insurance Fund from false, fraudulent, or invalid claims. The Director of the Department is charged by statute with the duty of administering the Cali-

fornia Unemployment Insurance Fund. Section 1522. The Director is also responsible for determining whether a claimant for unemployment insurance benefits is disqualified because he or she left his or her most recent work "voluntarily without good cause". Section 1256. However, Respondent Department's interest would not have been violated in this case by the granting of benefits to petitioner. Respondent Department's interest can also be protected in all other similar cases without the adoption of a rule which denies unemployment insurance benefits to claimants because they may have permitted economic necessity in a previous period of employment to conquer their sincerely held religious beliefs.

A

The interests of Respondent Department would not be adversely affected by the granting of benefits to petitioner.

Respondent Department and the Unemployment Insurance Fund are only adversely affected when unemployment insurance benefits are paid as a result of a claim which is in fact, false, fraudulent, or otherwise invalid. Petitioner's claim was none of these.

All three California courts which have heard this case agreed that petitioner's religious belief was sincere. Moreover, petitioner was following a clear doctrine of her church. That doctrine conflicted with the employment conditions established by her employer. She had held that belief for three years and her employer had accommodated her belief for two years by not requiring her to work on Saturday.

When her employer later refused to continue this accommodation, she continued working only "under protest" while waiting for her union to resolve the ongoing dispute. Petitioner had made her employer aware of the conflict between his demands and her belief and attempted to resolve the problem prior to the end of her employment.

Although employees of Respondent Department originally decided that petitioner's belief was not bona fide because she acceded to her employer's demands to work on her Sabbath, Respondent Department subsequently rejected that determination. Upon review of the record and the Superior Court's decision, Respondent Department agreed that Petitioner may fairly be said to have had an actual conflict between her working conditions and her bona fide religious beliefs. The fact that petitioner did not immediately refuse to work because of her belief should not have led to the determination that her belief was not sincere, especially in light of her efforts to retain employment and work out an accommodation with her employer.

The payment of unemployment insurance benefits to petitioner would not, therefore, have an adverse effect upon the interest of Respondent Department.

B

Respondent Department's interest does not justify a rule permitting the waiver of First Amendment rights.

Respondent Department need not disqualify unemployment insurance claimants merely because they

continue to work while holding a sincere religious belief that conflicts with their working conditions. The rule enunciated by the California Supreme Court which requires such disqualification is not warranted because alternative means of testing the validity of a claim of religious or conscientious objection are available to Respondent Department. Respondent can adequately protect the Unemployment Insurance Fund from false, fraudulent or invalid claims by making a determination as to whether an individual's stated religious objection to continuing employment actually conflicts with a bona fide religious belief. Such a test would ensure that only those claimants who would be held to have good cause reasons for quitting would be entitled to unemployment insurance benefits. The department's interest would thus be protected from invalid claims. A consideration by Respondent Department of various factors, including the following, would likely lead to a determination whether a religious belief is sincerely held:

1. Whether that belief is among the tenets of a recognized church, sect or denomination or whether it is only the claimant's individual belief.
2. Whether the tenets of the church forbid the claimant from engaging in the objectionable work.
3. Whether the work had a direct rather than indirect effect on the claimant's religious beliefs.

4. Whether the claimant observed all of the tenets of the religion or only those which suited his or her employment preferences.
5. Whether the claimant raised the problem with the employer in order to give the employer the opportunity to change the working conditions.
6. The length of time the belief has been held by the claimant.
7. Whether the belief has been consistently held by the claimant.

The availability of this approach obviates any need to protect Respondent Department's interest by a rule which disqualifies a claimant who continuously holds a religious belief, but who chooses to work and attempt to obtain a modification of her working conditions rather than abruptly quitting her job.

II

THE CALIFORNIA SUPREME COURT ERRED IN HOLDING THAT, UNDER SHERBERT, THE RIGHT TO RELIGIOUS FREEDOM CONSTITUTES "GOOD CAUSE" FOR A REFUSAL OF SUITABLE WORK, BUT THAT SAME RIGHT DOES NOT CONSTITUTE "GOOD CAUSE" FOR THE VOLUNTARY QUIT IN THIS CASE.

The California Supreme Court attempted to distinguish petitioner's refusal to continue employment which conflicted with her religious beliefs from this Court's holding in *Sherbert*. The stated basis for that distinction was the dissimilarity between "good cause"

for a refusal of suitable work and "good cause" for a voluntary quit. That distinction is erroneous and, if upheld, would seriously inhibit the exercise of constitutional rights.

Both California Unemployment Insurance Code sections 1256 and 1257(b) contain a "good cause" requirement. To be entitled to benefits a claimant may not have voluntarily quit his most recent employment unless he or she had "good cause" to do so. Similarly, a claimant must have "good cause" to refuse an offer of suitable work in order to remain eligible for unemployment insurance benefits. When testing for eligibility under section 1256 and disqualification under section 1257(b), Respondent Department must, therefore, determine whether "good cause" exists.

Although the concept of good cause is not totally identical in both contexts, the California courts have used interchangeably the same standard to determine the existence of good cause when the factor advanced as providing good cause is a constitutionally protected right. For example, the California Supreme Court has held that an employee has good cause to refuse suitable work where he has a sincerely held conscientious objection to taking a loyalty oath. *Syrek v. Calif. Unemployment Ins. App. Bd.* (1960) 54 C. 2d 519. The Court stated that "good cause" as used in section 1257(b):

"... means an adequate cause, a cause that comports with the purposes of the Unemployment Insurance Code and with other laws. Regarding it so, we believe that appellant had good cause

for his refusal, from the standpoint of public interest and from that of individual rights."

(54 Cal.2d at 529).

The Court held that a conscientious refusal to take a loyalty oath constituted good cause for refusal to accept suitable employment. In speaking of the constitutional guarantee of freedom of political belief and association the Court noted:

"Limitation of those freedoms by an administrative ruling, even if the limitation is done indirectly by job referral, cannot be supported."

(54 Cal.2d at 531).

Likewise, California courts have held that the First Amendment right to free expression constitutes good cause for voluntarily leaving work. For example, where an employee was required, as a condition of continued employment, to shave off his beard, the Court found his voluntary leaving to be with good cause. *King v. California Unemployment Insurance Appeals Bd.* (1972) 25 Cal.App.3d 199.²

The Court in *King* noted that the claimant was not challenging the validity of his dismissal, but was asserting a constitutional prohibition against the State's denial of unemployment insurance benefits. In upholding his constitutional challenge, the Court found a close parallel between this case and the good cause refusal of suitable work in *Sherbert v. Verner*.

²See also to same effect *Thornton v. Dept. of Human Resources Dev.* (1973), 32 Cal.App.3d 180; *McCrae v. Calif. Unemployment Ins. App. Bd.* (1973) 30 Cal.App.3d 89.

In *King* the claimant had worked for two years for the employer. The employer had a company rule prohibiting beards. Although King had previously worn a beard, he had removed it before he applied for work. King knew of the company policy against beards, but he nevertheless grew a beard. King asked the employer if he could have work which did not involve public contact, but the employer refused and demanded that the claimant remove his beard. King then quit.

The Court held that the claimant's insistence on wearing a beard constituted a constitutionally protected exercise of free speech and there was no compelling state interest shown to justify an infringement of that protected activity. The Court concluded:

"Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from [or quit] employment because of personal action which is constitutionally protected."

(25 Cal.App.3d at 206).³

The real importance of these cases is not their exposition of constitutional law, but rather the fact that prior to the California Supreme Court's decision below, California courts had consistently followed

³The California Courts have also used the same test for good cause in cases where employment discrimination constituted the reason for voluntarily quitting work. *Prescod v. Unemployment Ins. Appeals Bd.* (1976) 57 Cal.App.3d 29; *Morrison v. Cal. Unemployment Ins. Appeals Bd.* (1976) 65 Cal.App.3d 245; Cf. *Warriner v. Unemployment Ins. Appeals Bd.* (1973) 32 Cal.App.3d 353.

Sherbert and protected the exercise of First Amendment rights by holding that such exercise constituted "good cause" for either refusing suitable work or voluntarily leaving a job. The California Supreme Court's decision below is a foreboding departure from this Court's decision in *Sherbert*. As stated in the dissent in this case, such a denial of unemployment insurance benefits because of religious beliefs "constitutes overt hostility to religion and should not be upheld". Appendix to Petition, pp. 26a-27a.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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